STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM P. IRWIN and CYNTHIA R. IRWIN, d/b/a IRWIN POTATO FARMS,

Plaintiffs-Appellees,

v

DURUSSEL & DURUSSEL, INC. and MATTHEW DURUSSEL,

Defendants-Appellants.

UNPUBLISHED
June 1, 1999

No. 205706
Saginaw Circuit Court
LC No. 93-056041 NZ

WILLIAM P. IRWIN and CYNTHIA R. IRWIN, d/b/a IRWIN POTATO FARMS,

Plaintiffs-Appellants,

v

DURUSSEL & DURUSSEL, INC. and MATTHEW DURUSSEL,

Defendants-Appellees.

No. 205712
Saginaw Circuit Court
LC No. 93-056041 NZ

Before: Markman, P.J., and Griffin and Jansen, JJ.

JANSEN, J. (dissenting).

I respectfully dissent from the majority's decision to vacate the jury's verdict and remand for entry of judgment in favor of defendants. I would affirm the jury's verdict[1] and the trial court's denial of defendants' motions for a directed verdict, judgment notwithstanding the verdict (JNOV), or new trial in docket no. 205706. However, I would reverse the trial court's decision to reduce the jury's verdict by $297,000 in docket no. 205712.

In this appeal, defendants raise four issues. They argue that the trial court erred in denying their motion for JNOV because plaintiffs failed to prove their claim of tortious interference with a contract. Defendants also argue that the trial court abused its discretion in denying their motion for a new trial on the basis that plaintiffs' counsel committed prejudicial error by eliciting evidence about plaintiffs' settlement with a codefendant to prove the validity of their claim. Defendants further argue that the trial court abused its discretion in qualifying a proffered expert witness, and, lastly, that the trial court erred in allowing damages for lost profits and noneconomic damages. I find none of these issues to require reversal.

The only claim before the jury was plaintiffs' claim for tortious interference with a contract. The elements of this tort are: (1) a contract, (2) a breach, and (3) instigation of the breach without justification by the defendant. *Marhle v Danke*, 216 Mich App 343, 350; 549 NW2d 56 (1996). In *Hutton v Roberts*, 182 Mich App 153, 159; 451 NW2d 536 (1989), this Court, quoting from 4 Restatement Torts, 2d, § 766, p 7, stated that one who intentionally and improperly interferes with the performance of a contract between another and a third person by inducing or otherwise causing the third person to not perform the contract is subject to liability to the other from the failure of the third person to perform the contract.

In reviewing the evidence presented at trial, I conclude that plaintiffs established a prima facie case of tortious interference with a contract and that the trial court properly denied the motions for a directed verdict and JNOV. Defendants contend that there was no evidence to prove an intentional and improper interference with the potato insurance contract by them. Defendant Matthew DuRussel was the insurance agent who sold two crop insurance policies to plaintiffs. The potato contract was between plaintiffs and Crop Hail Management, Inc., the managing agent for the insurer Mutual Service Casualty Insurance Company. 1992 was apparently a bad year for potato farmers in Arenac county. There was evidence from other farmers that they too had a bad year for their potato crop. Apparently, late frosts and freezes and heavy rains damaged a great deal of the potato crops. DuRussel admitted at trial that four other farmers insured through his agency received the insurance claims they made on their potato crops. Additionally, Mr. Irwin testified that, despite his best efforts, he was unable to harvest the potatoes because of wet, muddy, and cold conditions.

The crux of the evidence, however, came from plaintiffs' counsel's impeachment of DuRussel through his prior deposition testimony. By way of impeachment, plaintiffs' counsel elicited evidence that, at his deposition, DuRussel testified that he volunteered information to John Mack (of Crop Hail Management) and Jack Brinkman (Crop Hail Management's adjuster) that plaintiffs did not have storage for the potato crop and that he (DuRussel) did not believe that plaintiffs should be paid on an insurance claim because they did not have storage for the potatoes before a potential freeze. DuRussel expanded on this by stating at his deposition that he volunteered the information to Crop Hail Management that plaintiffs did not have storage for their potatoes and should have had such storage available for the winter. At trial, DuRussel also admitted that he did not actually know if plaintiffs had

storage for the potatoes for the winter. In fact, DuRussel assumed that plaintiffs had no storage based on Mr. Irwin advising DuRussel that the Irwins were removing their equipment from the Wetzel farm.

Additional testimony supporting plaintiffs' theory that DuRussel intentionally and improperly interfered with the insurance contract came from Ann Flattery. She testified that DuRussel would comment that the Irwins did not have any storage for their potatoes, that the Irwins did not plan on taking the potatoes out of the ground, and that the Irwins were not very good farmers and were only farming for the insurance. Further, plaintiff's expert testified that under a hypothetical situation, it would be unethical and without legitimate reason for an insurance agent to inform Crop Hail Management that plaintiffs had no place to store their potatoes where this information was false.

Reviewing the evidence and all legitimate inferences in a light most favorable to plaintiffs, the evidence establishes their claim of tortious interference with a contract. *Orzel v Scott Drug Co*, 449 Mich 550, 557-558; 537 NW2d 208 (1995). This evidence is sufficient to show that DuRussel acted intentionally and improperly to cause Crop Hail Management to deny insurance proceeds owing to plaintiffs for the potato crop where DuRussel had no actual knowledge of lack of storage and believed that plaintiffs were not entitled to insurance proceeds based on his perception that they lacked storage for the winter. I conclude that the trial court did not err in denying defendants' motion for JNOV on plaintiffs' claim of tortious interference with a contract.

Next, defendants argue that plaintiffs' counsel committed prejudicial error by eliciting testimony about a settlement with Crop Hail Management. Defendants argue that this testimony was prejudicial because this was an attempt to prove wrongful conduct on the part of defendants and to prove the validity of plaintiffs' claim. The first incident concerned counsel's question of Ann Flattery, who worked for Berger & Company. Counsel elicited evidence from Flattery that Berger (who had been assigned plaintiffs' claim) filed suit against Crop Hail Management and that Berger was awarded a settlement. When counsel asked how much the settlement was, defense counsel objected, and the trial court sustained the objection. At closing argument, plaintiffs' counsel stated:

> Now, we know that there was an assignment of [plaintiffs'] claim for these insurance benefits to Berger and that Berger sued Crop Hail as a result. We know through testimony that Crop Hail settled that case. Is it any wonder that they settled it knowing what we know about how they operated, how they adjusted [plaintiffs'] claim, why they denied it? Is it any wonder that they settled? They didn't want to bring a case like that to the jury. Is there any real doubt that Crop Hail breached this contract? It's absolutely clear.

Defendants again objected and the trial court cautioned plaintiffs' counsel about not mentioning any settlement again. Plaintiffs' argument on appeal that counsel believed he could argue the fact of the settlement but not the amount is highly dubious since MRE 408 explicitly prohibits evidence of accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a claim which was disputed as to validity or amount to prove liability for the claim.

Counsel should not have elicited such information or argued it at closing argument; however, in light of the trial court's sustaining the objection and no indication in the record that counsel entered into a deliberate course of conduct aimed at preventing defendants from having a fair and impartial trial, *Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 111-112; 330 NW2d 638 (1982), I would hold that the trial court did not abuse its discretion in denying defendants' motion for a new trial on this basis.

Defendants next argue that the trial court abused its discretion in allowing James Colville to testify as an expert. Colville, an insurance agent and adjuster beginning in 1965, was an adjuster for loss caused by hail to vegetables (which includes potatoes). Defendants contend that Colville was not qualified to testify as an expert because this case involves a multi-peril claim, an area in which Colville apparently does not have experience. However, Colville reviewed the Potato Handbook, the loss adjustment manual, the schedules of insurance, insurance policies, Brinkman's records, and Crop Hail Management's claim file, the same records reviewed by defendants' expert.

I conclude that the trial court did not abuse its discretion in finding Colville to be qualified as an expert witness and that his alleged lack of expertise went to weight rather than to admissibility. *Bahr v Harper-Grace Hospitals*, 448 Mich 135, 141; 528 NW2d 170 (1995); *People v Whitfield*, 425 Mich 116, 123-124; 388 NW2d 206 (1986).

Lastly, defendants argue that the trial court erred in allowing damages for lost profits and/or noneconomic damages. The jury awarded $400,000 for noneconomic damages and $600,000 for lost profits (past, present, and future). This judgment was set off by $180,000, the amount settled between plaintiffs and Crop Hail Management and Mutual Service Casualty Insurance. Plaintiffs claimed damages for the amount of benefits due under the contract, future lost profits because the failure to pay put them out of the farming business, and emotional distress (noneconomic damages). 4 Restatement Torts, 2d, § 774A(1), pp 54-55 states that damages for the tort of interference with a contract include: (1) pecuniary loss of the benefits of the contract, (2) consequential losses for which the interference is a legal cause; and (3) emotional distress or actual harm to reputation if they are reasonably to be expected to result from the interference. See also, *Great Northern Packaging, Inc v General Tire and Rubber Co*, 154 Mich App 777, 785; 399 NW2d 408 (1986).[2]

The damages claimed by plaintiffs were entirely allowable under the Restatement, as set forth in *Great Northern Packaging*, and the amount of damages awarded by the jury were not speculative or excessive where, as noted by the trial court, there was ample evidence to support the jury's damages award because the highest amount the evidence would support was higher than the amount awarded by the jury. Accordingly, the trial court did not abuse its discretion in denying defendants' motion for remittitur. *Phillips v Deihm*, 213 Mich App 389, 404; 541 NW2d 566 (1995).

Docket No. 205712

In their appeal of right, plaintiffs argue that the trial court erred in reducing the verdict by $297,000 by invoking its equity powers. It has already been noted that a setoff of $180,000 was reduced from the verdict, which represented the amount of settlement between plaintiffs and Crop Hail Management and Mutual Service Casualty Insurance. This was proper since Crop Hail Management

and Mutual Service Casualty Insurance were originally defendants in this case. However, the trial court again reduced the verdict by an additional $297,000, which was part of a settlement amount that Crop Hail Management paid to Berger & Company, to whom plaintiffs had assigned their interest in the insurance policy. The amount of $297,000 was arrived at by calculating the difference between $445,000 that Berger filed on its proof of claim in plaintiffs' bankruptcy (the total amount of the settlement between Crop Hail Management and Berger) and the $148,000 still owing to Berger by plaintiffs as of June 13, 1996.

The trial court's decision to reduce the jury verdict by $297,000 by invoking its equitable powers was improper. Any settlement between Crop Hail Management and Berger is wholly inapplicable to any setoff in the present case. This case only presents the damages issue as between plaintiffs and the DuRussel defendants for a claim of tortious interference with a contract. This case does not present any claim between plaintiffs and Crop Hail Management, as that was settled before trial. Thus, there is no "double recovery" by plaintiffs such that the settlement between Berger and Crop Hail Management is to be set off from the jury's verdict. See *Chicilo v Marshall*, 185 Mich App 68, 70; 460 NW2d 231 (1990). I agree with plaintiffs' statement that the trial court should not have deducted Berger's settlement with Crop Hail Management because Berger's claim for insurance benefits has no legal relationship to plaintiffs' claim for lost profits and noneconomic damages against the DuRussel defendants. I would reverse the trial court's deduction of $297,000 from the jury's verdict.

I would affirm in docket no. 205706 and reverse in docket no. 205712.

/s/ Kathleen Jansen

[1] The jury found, specifically, that Mutual Service Casualty Insurance/Crop Hail Management breached the contract with plaintiffs, that defendants intentionally and improperly interfered with the contract, that defendants caused the insurers to breach the contract, that economic (lost profits) damages were $600,000, and noneconomic damages were $400,000.

[2] The cases relied upon by defendants, *Valentine v General American Credit, Inc*, 420 Mich 256; 362 NW2d 628 (1984); *Kewin v Massachusetts Mutual Life Ins Co*, 409 Mich 401; 295 NW2d 50 (1980); *Stewart v Rudner*, 349 Mich 459; 84 NW2d 816 (1957); *Gilroy v Conway*, 151 Mich App 628; 391 NW2d 419 (1986); *Paramet Homes, Inc v Republic Ins Co*, 111 Mich App 140; 314 NW2d 453 (1981), are inapposite. Those cases involve claims for *breach of contract*. This case involves a *tort* claim for interference with a contract. As our Supreme Court has noted in both *Valentine, supra*, p 263 and *Kewin, supra*, pp 420-421, a plaintiff may recover exemplary damages where there is an allegation and proof of tortious conduct existing independent of the breach of contract claim. Accord, *Phillips v Butterball Farms Co, Inc (After Second Remand)*, 448 Mich 239; 531 NW2d 144 (1995). Further, our Supreme Court has approved of the award of exemplary damages in the context of intentional tort cases. See *Veselenak v Smith*, 414 Mich 567, 575; 327 NW2d 261 (1982).